

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

6 CRIMINAL:11-241 (DRD)

7 [80] JOSEAN REYES-PAGÁN,

8 Defendant.

9

10 MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
11 RE: RULE 11 PROCEEDINGS (PLEA OF GUILTY)

12 **I. Procedural Background**

13 On September 19, 2011, a grand jury returned a nine-count superseding indictment against [80]
14 Josean Reyes-Pagán (hereinafter referred to as "defendant") and other individuals. (Docket No. 582.)
15 The defendant has agreed to plead guilty to count one of the superseding indictment. Count one charges
16 that from in or about the year 1998, and continuing up to and until the return of the superseding
17 indictment, in the District of Puerto Rico, specifically in the Municipality of San Juan, La Perla Ward,
18 and elsewhere within the jurisdiction of this court, Josean Reyes-Pagán and others did knowingly and
19 intentionally, combine, conspire, and agree to commit an offense against the United States, that is, to
20 knowingly and intentionally possess with intent to distribute and distribute controlled substances, to wit:
21 in excess of one (1) kilogram of heroin, a Schedule I, Narcotic Drug Controlled Substance; in excess
22 of five (5) kilograms of cocaine, a Schedule II, Narcotic Drug Controlled Substance; in excess of one
23 thousand (1,000) kilograms of marihuana, a Schedule I, Controlled Substance; a detectable amount of
24 oxycodone (commonly known as "Percocet"), a Schedule II Controlled Substance; and/or a detectable
25 amount of alprazolam (commonly known as "Xanax"), a Schedule IV Controlled Substance; within one
26 thousand (1,000) feet of the real property comprising a public school as prohibited by Title 21, United
27 States Code, Sections 841(a)(1) and 860, all in violation of Title 21, United States Code, Section 846.
28

II. Consent to Proceed Before a Magistrate Judge

On August 1, 2012, while assisted by counsel, the defendant, by consent, appeared before the undersigned in order to change his previous not guilty plea to a plea of guilty as to count one of the superseding indictment. In open court the defendant was questioned as to the purpose of the hearing being held and was advised of: (a) the nature and purpose of the hearing; (b) the fact that all inquiries were to be conducted under oath and that it was expected that his answers would be truthful; (c) the potential consequences of lying under oath (such as a perjury charge); and (d) his right to have the change of plea proceedings presided by a district judge instead of a magistrate judge. The defendant was also explained the differences between the appointment and functions of the two. The defendant consented to proceed before the undersigned magistrate judge.

III. Proceedings Under Rule 11, Federal Rules of Criminal Procedure**A. Rule 11(c)(1) Requirements**

Rule 11 of the Federal Rules of Criminal Procedure governs the acceptance of guilty pleas to federal criminal violations. Pursuant to Rule 11, in order for a plea of guilty to constitute a valid waiver of the defendant's right to trial, guilty pleas must be knowing and voluntary: "Rule 11 was intended to ensure that a defendant who pleads guilty does so with an 'understanding of the nature of the charge and consequences of his plea.'" United States v. Cotal-Crespo, 47 F.3d 1, 4 (1st Cir. 1995) (quoting McCarthy v. United States, 394 U.S. 459, 467 (1969)). [There are three core concerns in these proceedings]: 1) absence of coercion; 2) understanding of the charges; and 3) knowledge of the consequences of the guilty plea. United States v. Cotal-Crespo, 47 F.3d at 4 (citing United States v. Allard, 926 F.2d 1237, 1244-45 (1st Cir. 1991)).

United States v. Hernández-Wilson, 186 F.3d 1, 5 (1st Cir. 1999).

B. Admonishment of Constitutional Rights

To assure defendant's understanding and awareness of his rights, defendant was advised of his right:

1. To remain silent at trial and be presumed innocent, since it is the government who has the burden of proving his guilt beyond a reasonable doubt.
2. To testify or not to testify at trial, and that no adverse inference could be made in relation to his decision not to testify.

1

3

2 3. To a speedy trial before a district judge and a jury, at which he would be entitled to see and
3 cross examine the government witnesses, present evidence on his behalf, and challenge the
4 government's evidence.

5 4. To have a unanimous verdict rendered by a jury of twelve persons which would have to be
6 convinced of defendant's guilt beyond a reasonable doubt by means of admissible evidence.

7 5. To use the subpoena power of the court to compel the attendance of witnesses.

8 Upon listening to the defendant's responses, observing his demeanor and his speaking with his
9 attorney, that to the best of counsel's belief defendant had fully understood his rights, it is determined
10 that defendant is aware of his constitutional rights.

11 **C. Consequences of Pleading Guilty**

12 Upon advising defendant of his constitutional rights, he was further advised of the consequences
13 of pleading guilty. Specifically, defendant was advised that by pleading guilty and upon having his
14 guilty plea accepted by the court, he will be giving up the above rights and will be convicted solely on
15 his statement that he is guilty.

16 In response to further questioning, defendant was explained and he understood that if convicted
17 on count one as charged he will face not more than twice the following penalties: a term of
18 imprisonment of not less than ten (10) years or more than life, a fine not to exceed \$10,000,000, and
19 a term of supervised release of at least five (5) years. However, if the court accepts the defendant's
20 guilty plea and if the court accepts the amount of narcotics stipulated by the parties in the plea
21 agreement, that is at least five hundred (500) grams but less than two (2) kilograms of cocaine, the
22 penalty for the offense shall be not more than twice the following: a term of imprisonment of not less
23 than five (5) years and not more than forty (40) years, a fine not to exceed \$5,000,000, and a term of
24 supervised release of at least four (4) years.

25 The defendant was explained what the supervised release term means and was also made aware
26 that the court must impose a mandatory penalty assessment of one hundred dollars (\$100) per offense
27 pursuant Title 18, United States Code, Section 3013(a).

28

1

4

2 The defendant was advised that the ultimate sentence was a matter solely for the court to decide
3 in its discretion and that, even if the maximum imprisonment term and fine were to be imposed upon
4 him, he later could not withdraw his guilty plea for that reason alone. Furthermore, the defendant was
5 admonished of the fact that by pleading guilty he would not be allowed later on to withdraw his plea
6 because he eventually might disagree with the sentence imposed, and that if he violates the conditions
7 of supervised release, that privilege could be revoked and he could be required to serve an additional
8 term of imprisonment. He was also explained that parole has been abolished. The defendant understood
9 this.

10 **D. Plea Agreement¹**

11 The parties have entered into a written plea agreement that, upon being signed by the
12 government, defense attorney and defendant, was filed and made part of the record. Defendant was
13 clearly warned and recognized having understood that:

- 14 1. The plea agreement is not binding upon the sentencing court.
- 15 2. The plea agreement is an agreement between the defendant, defense counsel and the attorney
16 for the government which is presented as a recommendation to the court in regards to the applicable
17 sentencing adjustments and guidelines, which are advisory.
- 18 3. The agreement provides a sentencing recommendation and/or anticipated sentencing
19 guideline computation, that can be either accepted or rejected by the sentencing court.
- 20 4. In spite of the plea agreement and any sentencing recommendation contained therein, the
21 sentencing court retains full discretion to reject such plea agreement and impose any sentence up to the
22 maximum possible penalty prescribed by statute.

23 Defendant acknowledged having understood these explanations.

24

25

26

27

28

¹ "Plea agreement" refers to the agreement and its supplement.

1

5

2

E. Government's Evidence (Basis in Fact)

3

The government presented a proffer of its evidence consistent with the version of facts of the plea agreement with which the defendant concurred. Accordingly, it is determined that there is a basis in fact and evidence to establish all the elements of the offense charged.

6

F. Voluntariness

7

The defendant accepted that no threats had been made to induce him to plead guilty and that he did not feel pressured to plead guilty.

9

G. Waiver of Appeal

10

The defendant was explained, and he understood, that if the court accepts the plea agreement and sentences him according to its terms and conditions, he will be surrendering his right to appeal the sentence and judgment in this case.

13

IV. Conclusion

14

The defendant, by consent, has appeared before me pursuant to Rule 11, Federal Rules of Criminal Procedure, and has entered a plea of guilty as to count one of the superseding indictment. After cautioning and examining the defendant under oath and in open court, concerning each of the subject matters mentioned in Rule 11, as described in the preceding sections, I find that defendant is competent to enter this guilty plea, is aware of the nature of the offense charged and the maximum statutory penalties that the same carries, understands that the charge is supported by the government's evidence, has admitted to every element of the offense charged, and has done so in an intelligent and voluntary manner with full knowledge of the consequences of his guilty plea. Therefore, I recommend that the court accept the guilty plea of the defendant and that the defendant be adjudged guilty as to count one of the superseding indictment.

24

This report and recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B). Any objections to the same must be specific and must be filed with the Clerk of Court within fourteen (14) days of its receipt. Fed. R. Civ. P. 72(b). Failure to timely file specific objections to the report and recommendation

27

28

1 6
2
3

is a waiver of the right to review by the district court. United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986).

4 SO RECOMMENDED.

5 At San Juan, Puerto Rico, this 3rd day of August, 2012.

6
7 s/Marcos E. López
U.S. Magistrate Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28